

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)	
)	NOS. CR-06-6020-LRS
Respondent,)	CV-08-5082-LRS
)	
-vs-)	
)	ORDER DENYING 28 U.S.C. §2255
ELIX JERMAINE WADE,)	MOTION
)	
Petitioner.)	

Before the Court is Petitioner's 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed November 24, 2008 (Ct. Rec. 149, CR-06-6020-LRS, Ct. Rec. 1, CV-08-5082-LRS). The Motion is submitted by Elix Wade, who is appearing *pro se* for the purpose of these proceedings.

I. BACKGROUND

Mr. Wade was indicted on May 16, 2006 for Possession of a Firearm by a Prohibited Person in violation of 18 U.S.C. § 922(g)(1). Mr. Wade proceeded to trial and was found guilty by a jury of Count One of the Indictment on July 25, 2006. On August 1, 2006, Mr. Wade filed a motion for a new trial. Ct. Rec. 83. On September 1, 2007, the Court entered an Order Denying Defendant's Motion for New Trial. Ct. Rec. 88. On December 5, 2006, Mr. Wade, through his newly appointed attorney, filed a Motion to Compel Palm Print Exemplars and Release Ammunition and Cartridges For Testing. Ct. Rec. 114. On December 21, 2006, the Court

1 entered an Order Denying Motion to Require Law Enforcement to Provide
2 Palm Print Exemplars and to Release the Ammunition and Cartridge for
3 Testing. Ct. Rec. 119. On December 21, 2006, Mr. Wade, through counsel,
4 filed a Motion for Reconsideration of Order Denying Motion for New Trial.
5 Ct. Rec. 120. On February 23, 2007, the Court entered an Order Denying
6 Defendant's Motion To Reconsider Order Denying New Trial. Ct. Rec. 125.
7 On March 1, 2007, Mr. Wade was sentenced to a 63-month term of
8 imprisonment with three years supervised release; and a special
9 assessment of \$100. Mr. Wade filed a direct appeal of his judgment and
10 sentence on March 1, 2007. On March 2, 2007 Dan Bruce was appointed to
11 represent Mr. Wade. The United States Court of Appeals for the Ninth
12 Circuit affirmed the judgment of the District Court on January 2, 2008.
13 Ct. Rec. 148. Mr. Wade contends that his sentence is unconstitutional
14 based on one ground: ineffective assistance of counsel. Ct. Rec. 149,
15 at 5-6.

16 II. DISCUSSION

17 28 U.S.C. § 2255 provides, in part:

18 A prisoner in custody under sentence of a court
19 established by Act of Congress claiming the right to be
20 released upon the ground that the sentence was imposed
21 in violation of the Constitution or laws of the United
22 States, or that the court was without jurisdiction to
23 impose such sentence, or that the sentence was in excess
24 of the maximum authorized by law, or is otherwise
25 subject to collateral attack, may move the court which
26 imposed the sentence to vacate, set aside or correct the
sentence.

24 A petitioner is entitled to an evidentiary hearing on the motion to
25 vacate his sentence under 28 U.S.C. § 2255, unless the motions and the
26 files and records of the case conclusively show that the prisoner is

1 entitled to no relief. This inquiry necessitates a twofold analysis: (1)
2 whether the petitioner's allegations specifically delineate the factual
3 basis of his claim; and, (2) even where the allegations are specific,
4 whether the records, files and affidavits are conclusive against the
5 petitioner. *United States v. Taylor*, 648 F.2d 565, 573 (9th Cir.), cert.
6 denied, 454 U.S. 866 (1981) (internal quotations, citations and footnote
7 omitted).

8 This Court has carefully reviewed the record and, for the reasons
9 set forth more fully below, concludes Petitioner is not entitled to an
10 evidentiary hearing. A habeas corpus petitioner is entitled to an
11 evidentiary hearing in federal court if he alleges facts which, if
12 proven, would entitle him to habeas corpus relief. *Smith v. Singletary*,
13 170 F.3d 1051, 1053-54 (11th Cir.1999) (citation omitted); *Cave v.*
14 *Singletary*, 971 F.2d 1513, 1516 (11th Cir.1992) (citing *Townsend v. Sain*,
15 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)). Here, the pertinent
16 facts of the case are fully developed in the record before the Court.
17 *Smith*, 170 F.3d at 1054 (stating that a district court does not need to
18 conduct an evidentiary hearing "if it can be conclusively determined from
19 the record that the petitioner was not denied effective assistance of
20 counsel"). No evidentiary proceedings are required in this Court. *High*
21 *v. Head*, 209 F.3d 1257, 1263 (11th Cir.2000) (citing *McCleskey v. Zant*,
22 499 U.S. 467, 494, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991)), cert. denied,
23 532 U.S. 909, 121 S.Ct. 1237, 149 L.Ed.2d 145 (2001).

24 Further, the statute provides that only if the motion, file, and
25 records "conclusively show that the movant is entitled to no relief" may
26 the Court summarily dismiss the Motion without sending it to the United

1 States Attorney for response. 28 U.S.C. § 2255. The Rules regarding
2 section 2255 proceedings similarly state that the Court may summarily
3 order dismissal of a § 2255 motion without service upon the United States
4 Attorney only "if it plainly appears from the face of the motion and any
5 annexed exhibits and the prior proceedings in the case that the movant
6 is not entitled to relief in the district court." Rule 4(a), RULES-SECTION
7 2255 PROCEEDINGS. Thus, when a movant fails to state a claim upon which
8 relief can be granted or when the motion is incredible or patently
9 frivolous, the district court may summarily dismiss the motion. *Cf.*
10 *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989); *Marrow v.*
11 *United States*, 772 F.2d 525, 526 (9th Cir. 1985).

12 **A. GROUNDS ONE and TWO-INEFFECTIVE ASSISTANCE OF COUNSEL**

13 Mr. Wade alleges that his attorney George Trejo deprived him of his
14 constitutional right to effective assistance of counsel. In support of
15 his ineffective counsel claim, Mr. Wade alleges two grounds:

16 1) "Counsel was ineffective for failing to pursue exculpatory
17 investigative avenue provided by defendant." Ct. Rec. 149-2 at 1.

18 2) "Counsel was ineffective for failing to renew the suppression
19 motion after discovering a material variance between the testimony of
20 Officer Aparicio and Agent Floyd of ATF at the suppression hearing and
21 the one at trial." Ct. Rec. 149-2 at 5.

22 1. Pretrial Investigation

23 Mr. Wade supports his allegations with a declaration of himself and
24 a declaration of Lilton L. Green, Mr. Wade's uncle. As to his first
25 ground, Mr. Wade states that "there were eyewitnesses who would testify
26 that he did not and could not have possessed, let alone threw away the

1 gun in question." Mr. Wade states that counsel barely visited Defendant
2 to discuss the progress in his preparation of the case nor did counsel
3 contact the witnesses he had agreed to contact. Ct. Rec. Rec. 149-2 at
4 2. Defendant's uncle, Lilton Green, states in his declaration that
5 "every attempt to get Mr. Trejo to come to obtain their input was in
6 vain." *Id.* Mr. Wade states he sought to remove Mr. Trejo from
7 representing him but the trial judge declined to let counsel be removed
8 or grant a continuance. *Id.*

9 Mr. Wade also states that at trial it was learned that "Officer
10 Aparacio [sic] and other officers manhandled and denigrated the gun
11 evidence without regard for their own rules concerning collection of
12 fingerprint and DNA evidence and maintenance of chain of custody
13 procedure." *Id.* at 4. Mr. Wade also suggests that the Pasco police
14 department had a motive for allegedly and possibly framing him because
15 of his connection to the BGD, a group that some of Mr. Wade's friends
16 belonged to. Mr. Wade asks the Court to ultimately overturn his
17 conviction due to his counsel's alleged failure to complete his
18 investigation in his case.

19 Mr. Wade concludes that "there can be no question that counsel's
20 failure to investigate, whether brought about by pure dereliction or
21 because of Defendant's inability to continue to pay him was below
22 professional standard and prejudiced Defendant." *Id.*

23 2. Renewal of Suppression Motion

24 Mr. Wade alleges that had the trial judge known conclusively at the
25 suppression hearing that his fingerprint was not on the gun, he would
26 have granted the suppression motion. Ct. Rec. 149-2 at 6. Mr. Wade

1 argues that the absence of his fingerprint and DNA will prove that he
2 never saw or possessed a gun. *Id.* at 7. Mr. Wade argues that "had
3 counsel done the proper investigation and/or examined the evidence before
4 the suppression hearing and trial, he would have been able to
5 persuasively argue to the jury that some shennanigan [sic] had taken
6 place." Mr. Wade suggests that counsel was angry he had not been paid
7 and somehow this affected his decision not to renew the suppression
8 motion after he was told to do so by Petitioner.

9 C. Analysis

10 After a careful review of the transcripts and file, the Court
11 rejects Mr. Wade's arguments, and concludes that defense counsel's
12 performance was not deficient. There is no showing that counsel's
13 efforts were not those of a reasonably competent practitioner. Mr. Wade
14 makes vague, conclusory and unsubstantiated allegations and points to no
15 deficient performance by counsel which prejudiced his case or deprived
16 him of an opportunity to have a fair trial. *Strickland v. Washington*, 466
17 U.S. 668, 687-88, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Likewise
18 there is abundant evidence that counsel vigorously defended Mr. Wade at
19 his evidentiary hearing for suppression of evidence and statements made
20 by Mr. Wade at the time of his arrest.

21 Prior to arrest, however, the record is clear that Officer Aparicio
22 had reasonable, articulable suspicion to stop the vehicle
23 Petitioner/Defendant was in, while responding to a call that a fight was
24 in progress at 603 N. Arbutus in Pasco, Washington. Officer Aparicio
25 then observed the Petitioner/Defendant get out of the right side of the
26 vehicle and run (or rapidly jog) away from law enforcement as Officer

1 Aparicio was telling one or more occupants of the vehicle to remain
2 inside. Officer Aparicio then observed Petitioner/Defendant throw a
3 heavy, angular object. Defendant then stopped, as commanded, and upon
4 request for identification, gave law enforcement a false identity. The
5 Court found that after further investigation during a reasonably brief
6 10-15 minute detention of Petitioner/Defendant, Officer Aparicio had
7 probable cause to arrest Defendant based on his real identity as a felon,
8 and the discovery of a loaded firearm in the vicinity of where the
9 officer observed an object being thrown by Petitioner/Defendant. Ct.
10 Rec. 61.

11 Mr. Wade contends that his lawyer failed to investigate his case and
12 contact potential witnesses. Defense counsel has a duty to make
13 reasonable investigations or to make a reasonable decision that makes
14 particular investigations unnecessary. *Strickland*, 466 U.S. at 691, 104
15 S.Ct. 2052. In any ineffectiveness case, a particular decision not to
16 investigate must be directly assessed for reasonableness in all the
17 circumstances, applying a heavy measure of deference to counsel's
18 judgments. *Id.*; *Burger v. Kemp*, 483 U.S. 776, 794-95, 107 S.Ct. 3114,
19 97 L.Ed.2d 638 (1987).

20 An attorney's failure to locate potential witnesses will usually
21 constitute ineffective assistance when, without adequate justification,
22 the attorney refuses or neglects to perform any investigation into leads
23 directly related and of potentially great benefit to the defense. See
24 *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir.1995), *cert. denied*,
25 517 U.S. 1111, 116 S.Ct. 1335, 134 L.Ed.2d 485 (1996). However, defense
26 counsel need not follow every idea suggested by his client. See *United*

1 *States v. Tucker*, 716 F.2d 576, 584 (9th Cir.1983) ("the duty to
2 investigate and prepare a defense is not limitless: it does not
3 necessarily require that every conceivable witness be interviewed"). The
4 potential eyewitness Mr. Wade suggests that his attorney should have
5 pursued is his uncle, who was a passenger in the car Petitioner was in
6 close to the time of arrest. It is entirely possible that Mr. Wade's
7 uncle would have been viewed as being biased and lacking credibility.
8 The Court is guided to give deference to defense counsel's judgments.

9 As to other potential, unnamed witnesses, counsel's tactical
10 decision in this regard does not constitute ineffective assistance.
11 *Strickland*, 466 U.S. at 687. Even assuming arguendo that counsel's
12 failure to investigate and present these unnamed witnesses was outside
13 "the wide range of professionally competent assistance," Petitioner has
14 failed to demonstrate prejudice. Petitioner's speculation regarding what
15 these prospective witnesses would have testified to is insufficient for
16 this purpose. See *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir.2000)
17 (ineffective assistance claim based on an alleged failure to investigate
18 witness rejected where petitioner did not present an affidavit from
19 witness demonstrating that he would have provided testimony helpful to
20 the defense); *Villafuerte v. Stewart*, 111 F.3d 616, 632 (9th Cir.1997)
21 (petitioner's ineffective assistance claim rejected where he presented
22 no evidence concerning what counsel would have found had he investigated
23 further, or what lengthier preparation would have accomplished); *United*
24 *States v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir.1988) (no ineffective
25 assistance based upon counsel's failure to call a witness where, among
26 other things, there was no evidence in the record that the witness would

1 have testified). Petitioner has failed to demonstrate prejudice with
2 respect to these claims.

3 Finally, the Court has reviewed Mr. Wade's "Supplement to §2255,"
4 Ct. Rec. 150, filed March 23, 2009, and finds that the disciplinary
5 proceeding and suspension article regarding Mr. Trejo referenced by
6 Petitioner has no direct applicability to this case. As such, it will
7 carry no weight in this decision.

8 Petitioner has failed to demonstrate prejudice with respect to his
9 ineffectiveness of counsel claims. In this regard he has failed to
10 present any evidence suggesting a "reasonable probability that, but for
11 counsel's unprofessional errors, the result of the proceeding would have
12 been different." *Strickland*, 466 U.S. at 694.

13 Reviewing the transcripts and other papers filed in this case, the
14 Court finds that Mr. Wade's circumstances did not amount to a
15 constitutional violation of his 6th Amendment right. In addressing the
16 issue of ineffective assistance of counsel, the Court is guided by
17 *Strickland*. As required by that analytical framework:

18 First, the defendant must show that counsel's
19 performance was deficient. This requires showing that
20 counsel made errors so serious that counsel was not
21 functioning as the "counsel" guaranteed the defendant by
22 the Sixth Amendment. Second, the defendant must show
23 that the deficient performance prejudiced the defense.
24 This requires showing that counsel's errors were so
25 serious as to deprive the defendant of a fair trial, a
26 trial whose result is reliable.
Id. at 687.

27 Establishing these two elements is not easy: "the cases in which
28 habeas petitioners can properly prevail on the ground of ineffective
29 assistance of counsel are few and far between." *Waters v. Thomas*, 46 F.3d

1 1506, 1511 (11th Cir.1995) (*en banc*) (*quoting Rogers v. Zant*, 13 F.3d
2 384, 386 (11th Cir.1994)).

3 In *Groseclose v. Bell*, 130 F.3d 1161, 1167 (6th Cir.1997),
4 discussing the first prong of the *Strickland* analysis, the Sixth Circuit
5 recognized:

6 The [Supreme] Court cautioned that in undertaking an
7 ineffective-assistance review, "[j]udicial scrutiny of
8 counsel's performance must be highly deferential," and
9 must avoid the "second-guess[ing of] counsel's
10 assistance ..., [as] it is all too easy for a court,
11 examining counsel's defense after it has proved
12 unsuccessful, to conclude that a particular act or
13 omission of counsel was unreasonable." *Strickland*, 466
14 U.S. at 689. In order to avoid "the distorting effects
15 of hindsight," a reviewing "court must indulge a strong
16 presumption that counsel's conduct falls within the wide
17 range of reasonable professional assistance; that is,
18 the defendant must overcome the presumption that . . .
19 the challenged action 'might be considered sound trial
20 strategy.'" ' *Id.* (citation omitted).

21 Furthermore, in evaluating the prejudice suffered by a petitioner
22 as a result of alleged ineffective assistance of counsel, "[i]t is not
23 enough for the defendant to show that the errors had some conceivable
24 effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693.
25 Indeed, "[v]irtually every act or omission of counsel would meet that
26 test, and not every error that conceivably could have influenced the
outcome undermines the reliability of the result of the proceeding." *Id.*
(citation omitted). Rather, the petitioner "must show that there is a
reasonable probability that, but for counsel's unprofessional errors, the
result of the proceeding would have been different. A reasonable
probability is a probability sufficient to undermine confidence in the
outcome." *Id.* at 694.

1 Finally, in conducting this inquiry, we need not apply *Strickland's*
2 principles in a mechanical fashion. As the Supreme Court explained:

3 [A] court need not determine whether counsel's
4 performance was deficient before examining the prejudice
5 suffered by the defendant as a result of the alleged
6 deficiencies. The object of an ineffectiveness claim is
7 not to grade counsel's performance. If it is easier to
dispose of an ineffectiveness claim on the ground of
lack of sufficient prejudice, which we expect will often
be so, that course should be followed.

Id. at 697.

8 The Court begins its review by either determining whether counsel's
9 performance was deficient, or by determining any possible prejudice
10 suffered by Mr. Wade. In either event, the result in this case is
11 identical.

12 There is no indication that Mr. Wade was prejudiced. Even assuming
13 arguendo deficient performance by defense counsel, Petitioner has not
14 shown prejudice. Under the prejudice prong of the inquiry, Petitioner
15 "must affirmatively prove prejudice by showing that counsel's errors
16 actually had an adverse effect on the defense." *United States v. Freixas*,
17 332 F.3d 1314, 1320 (11th Cir.2003). This showing requires "more than
18 some conceivable effect on the outcome of the proceeding." *Id.* Here,
19 Petitioner has not shown that a reasonable probability exists that the
20 outcome of the case would have been different if his attorney had given
21 the assistance that Petitioner has alleged he should have provided. This
22 ineffectiveness claim is without merit. The Court finds that the
23 Petitioner has not provided any evidence to convince this Court that his
24 constitutional rights were violated.

25 The court must review the entire record when the sufficiency of the
26 evidence is challenged in habeas proceedings. *Adamson v. Ricketts*, 758

1 F.2d 441, 448 n. 11 (9th Cir.1985), *vacated on other grounds*, 789 F.2d
2 722 (9th Cir.1986) (en banc), *rev'd*, 483 U.S. 1, 107 S.Ct. 2680, 97
3 L.Ed.2d 1 (1987). It is the province of the jury to "resolve conflicts
4 in the testimony, to weigh the evidence, and to draw reasonable
5 inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443
6 U.S. 307, 319(1979). If the trier of fact could draw conflicting
7 inferences from the evidence, the court in its review will assign the
8 inference that favors conviction. *McMillan v. Gomez*, 19 F.3d 465, 469
9 (9th Cir.1994). The relevant inquiry is not whether the evidence excludes
10 every hypothesis except guilt, but whether the jury could reasonably
11 arrive at its verdict. *United States v. Mares*, 940 F.2d 455, 458 (9th
12 Cir.1991). Thus, "[t]he question is not whether we are personally
13 convinced beyond a reasonable doubt. It is whether rational jurors could
14 reach the conclusion that these jurors reached." *Roehler v. Borg*, 945
15 F.2d 303, 306 (9th Cir.1991). After reviewing the record, this Court
16 concludes that there was sufficient evidence introduced at Petitioner's
17 trial to establish beyond a reasonable doubt that he possessed a firearm
18 and that he was a prohibited person. Petitioner was convicted based
19 largely on the testimony of the police officer, Aparicio, which the jury
20 apparently believed.

21 The Petitioner is not entitled to an evidentiary hearing on the
22 motion to vacate his sentence under 28 U.S.C. § 2255. Additionally, the
23 Court summarily dismisses the Motion without sending it to the United
24 States Attorney for response. Accordingly,

25 **IT IS ORDERED** that:
26

(a) File this Order;

(c) CLOSE THESE FILES.

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE